Cole, Raywid & Braverman, L.L.P.

ATTORNEYS AT LAW
1919 PENNSYLVANIA AVENUE, N.W., SUITE 200
WASHINGTON, D.C. 20006-3458
Telephone (202) 659-9750
Fax (202) 452-0067
www.crblaw.com

Geoffrey C. Cook
Direct Dial
202-828-9833
gcook@crblaw.com

Los Angeles office
2381 Rosecrans Avenue, Suite 110
El Segundo, California 90245-4290
Telephone (310) 643-7999
Fax (310) 643-7997

August 1, 2005

BY HAND DELIVERY

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

Re: Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.; EB Docket No. 04-381

Dear Ms. Dortch:

Enclosed for filing in the above proceeding please find the original and six (6) copies of two different versions of Complainants' Motion to Dismiss: (1) a Confidential Version and (2) a Redacted Version.

(1) The Redacted Version may be placed in Commission's public file.

(2) The Confidential Version, which, as set forth in a separate cover letter herein, contains confidential material covered by a Stipulation and Agreed Confidentiality Order dated February 10, 2005, entered by the Honorable Richard L. Sippel, in E.B. Docket No. 04-381, may NOT be placed in the Commission's public file. The Confidential Version of the Motion to Dismiss (enclosed in a separately marked envelope) contains three pages (pages 4, 25, and 26) that contain confidential information as well as two exhibits (Exhibits A and B) containing confidential information, and, accordingly, the Confidential Version should be filed and kept under seal.

Also enclosed is a **"Stamp and Return"** copy of this cover letter that we ask be stamped with the FCC's date of filing and then returned to our messenger.

Thank you for your assistance.

Sincerely,

Geoffrey C. Cook

Enclosures

cc: Service List

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., COX COMMUNICATIONS GULF COAST, L.L.C., *et. al.* *Complainants,* v. GULF POWER COMPANY, *Respondent.*	E.B. Docket No. 04-381

To: Office of the Secretary

Attn: The Honorable Richard L. Sippel
Chief Administrative Law Judge

COMPLAINANTS' MOTION TO DISMISS
(REDACTED VERSION)

The Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., and Bright House Networks, L.L.C. ("Complainants"), by their attorneys, respectfully move to dismiss all proceedings on Gulf Power Company's ("Gulf Power") claim for compensation above its marginal costs for hosting Complainants' pole attachments. As set forth in more detail below, these proceedings should be dismissed because Gulf Power's responses to Complainants' discovery requests show that it: cannot meet the requirements for a Fifth Amendment takings claim involving utility pole attachments, as set forth in the Eleventh Circuit's decision in *Alabama Power v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, 540 U.S. 937 (2003) ("*Alabama Power*"), and cannot substantiate any of the evidentiary allegations in its January 8, 2004 Description of Evidence that were the sole basis for the Bureau's issuance of the hearing Designation Order ("HDO").

BACKGROUND

This case concerns Gulf Power's claim that it is entitled, under the Fifth Amendment of the United States Constitution, to demand a "just compensation" annual pole attachment rate in excess of the total compensation it already receives from Complainant cable operators in the form of the pole make-ready payments, made prior to attaching, and the annual pole rental it receives under the Federal Communications Commission's ("FCC" or "Commission") Cable Formula, which was established in Section 224(d) of the Communications Act, 47 U.S.C. § 224(d), and calculated pursuant to the Commission's regulations, 47 C.F.R. §§ 1.1401, *et seq.*

Complainants filed their complaint in this matter against Gulf Power on July 10, 2000, alleging that Gulf Power violated section 224 of the Communications Act and the Commission's pole attachment rules by unilaterally terminating its existing pole attachment agreements with Complainant cable operators, forcing the cable operators to execute new pole attachment agreements that contained pole attachment rates several times higher than those allowed under Commission regulations, and refusing to renegotiate new rates in good faith in accordance with the Cable Formula.

On May 13, 2003, the Commission's Enforcement Bureau granted the Complaint, finding, *inter alia*, that the Cable Formula provided Gulf Power with just compensation. The Bureau relied upon the Commission's prior ruling that the Cable Formula, along with the payment of make-ready expenses, provides remuneration that *exceeds* any "just compensation" due to Gulf Power from Complainants' cable attachments. *Florida Cable Telecommunications Ass'n, Inc. et al. v. Gulf Power Co.*, 18 F.C.C.R. 9599 (May 13, 2003)("*Bureau Order*"). The Bureau relied on the full Commission's decision in *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*,

Order, 16 F.C.C.R. 12209, 12223-36, ¶¶ 32-61 (2001). The Commission's ruling was upheld by the United States Court of Appeals for the Eleventh Circuit in *Alabama Power*, 311 F.3d at 1371.

In Alabama Power, the Eleventh Circuit, guided by the bedrock principle that "just compensation is determined by the loss to the person whose property is taken, 311 F.3d at 1369, concluded that, because Alabama Power (a subsidiary, along with Gulf Power, of the Southern Company) had not even alleged, much less shown, that it had incurred an actual loss or a quantifiable lost opportunity cost for the time period at issue in the complaint proceeding, it "had no claim." *Id.* at 1370. The Eleventh Circuit concluded that, absent such a showing supported by evidence for specific poles, payment of a pole owner's "marginal costs provides just compensation," and, notably, the court observed that the Commission's Cable Formula provides "much *more* than marginal cost." *Id.* at 1370 and n.23 (emphasis added).

The Eleventh Circuit further held, that, as a constitutional matter:

> [B]efore a power company can seek compensation *above* marginal cost, it must show with regard to *each* pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (*which provides for much more than marginal cost*) necessarily provides just compensation.

Id. at 1370-71 (emphasis supplied). The Court explained that "there is no 'lost opportunity' foreclosed by the government unless the two factors are present." *Id.* at 1371

The Eleventh Circuit also rejected Alabama Power's claim to be entitled to a hearing, noting that when the dispute is "only over the methodology that should be used to calculate the level of just compensation," this is only a "legal issue that hardly warrants an evidentiary hearing." *Id.* at 1372. The FCC "was not obliged to engage in detailed analysis of expert testimony concerning the value proxies proffered by [the utility's] experts, which were irrelevant given the sufficiency of marginal

cost." *Id.* at 1371. A hearing would be warranted only if a utility were to "identify a material question of fact." *Id.* at 1372. Because utilities already collect "*much more than* marginal cost" from attachers under the FCC regulations, it seemed unlikely after *Alabama Power* that any just compensation claim could result in a higher rental than is already paid.

Nonetheless, following the Eleventh Circuit's decision, Gulf Power filed a Petition for Rehearing with the Bureau seeking a "full evidentiary hearing" to allow it "an opportunity to meet the new standard" set forth in *Alabama Power*. *See Gulf Power Company's Petition for Reconsideration and Request for Evidentiary Hearing* (P.A. No. 00-004, June 23, 2003)("Pet. for Reconsideration"). Gulf power first challenged the Eleventh Circuit's "creation of an entirely new legal standard," and complained that it was never provided the opportunity to "introduce evidence specifically targeted to meet the new standard." *Pet. for Reconsideration*, i.[1] While Gulf Power did attach some materials to its Petition for Reconsideration, none specifically detailed evidence pertaining to specific poles or whether any poles were at "full capacity." Pet. for Reconsideration, Tabs A-C. Moreover, their claim of full poles is undercut by [MATERIAL REDACTED PURSUANT TO THE STIPULATION AND AGREED CONFIDENTIALITY ORDER OF FEBRUARY 10, 2005].[2] After receiving Complainants' Opposition to the petition, but before ruling on Gulf Power's Petition, the Bureau asked Gulf Power to "describe" the evidence that it wished to proffer in response to the Alabama Power standard. *See Letter Ruling* (PA 00-004, Dec. 9, 2003)(Attached hereto as Exhibit C).

---

[1] Interestingly, Alabama Power, represented by the same counsel as Gulf power here, never asked for such a hearing on its claims. Perhaps Alabama Power felt constrained by the admonition that because it had never made the allegation of "full capacity" or shown any loss that "it had no claim." Although Gulf Power similarly had made no such allegation or shown any loss, it apparently felt no similar constraint.

[2] *See* Gulf Power Doc. Nos. 2181-2206 (Exhibit A) showing an average throughout Gulf Power's service area of [MATERIAL REDACTED PURSUANT TO THE STIPULATION AND AGREED CONFIDENTIALITY ORDER OF FEBRUARY 10, 2005]. Gulf Power Doc. Nos. 2310-2404 (Exhibit B).

On January 8, 2004, Gulf Power filed its "Description of Evidence Gulf Power Seeks To Present In Satisfaction Of The Eleventh Circuit's Test" ("Description of Evidence"). In its Description of Evidence, Gulf Power indicated that it would proffer certain evidence, including: (1) evidence of pole change-outs to accommodate new attachments of telecommunications carriers over unspecified years (some for 1998-2002) along with evidence that some of these new telecom attachers pay an "unregulated rate" for pole space on some poles; (2) evidence of make-ready for telecommunications carriers and different cable operators that have paid for change-outs of unspecified poles over an unspecified period of time; and (3) load studies and business plans addressing the potential impact of third-party attachments and Gulf Power's changing-out of poles for its own core service needs. Because this was a proffer, it was reasonable to assume that Gulf Power had such evidence in its possession that was capable of being "described" in its submission.

After receiving Gulf Power's Description of Evidence, the Bureau initiated this proceeding to afford Gulf Power a hearing "to present the evidence delineated in its Description of Evidence." Hearing Designation Order (Sept. 27, 2004)("HDO"), ¶ 5.

The Bureau's HDO specified that the "issue" for the hearing would be: "Whether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators, and, if so, the amount of any such compensation." The HDO further stated that Gulf Power "bears the burden of proceeding with the introduction of evidence and the burden of proving it is entitled to compensation *above marginal cost* with respect to *specific poles*" [emphasis added]. HDO, ¶ 8.

Consistent with *Alabama Power*, because Gulf Power already receives "much more than marginal cost" under the Commission's Cable Formula rate, 311 F.3d at 1370-71, Gulf Power would have to show an actual loss or specific, quantifiable lost opportunity (that it was "out . . .

more money" as a consequence of Complainants' attachments, 311 F.3d at 1369) with respect to each pole for which it seeks a constitutional entitlement to an annual rate higher than its existing compensation through both make-ready and the Cable Formula.

In order to discover what evidence, if any, Gulf Power has that would satisfy the strict requirements of *Alabama Power* and the HDO, Complainants served Gulf Power with 48 Interrogatories and 35 Document Requests on February 1, 2005.

Shortly before Gulf Power served its responses on April 18, 2005, the Presiding Judge issued an Order stating that Complainants' discovery requests "appear on their face to constitute fair questions to pose to Gulf Power, the party seeking a substantial increase in monetary rent." April 15, 2005 Status Order (FCC 05M-23), 8.

However, as set forth below, Gulf Power's Responses to Complainants' Interrogatories, Exhibit D hereto, make clear that, despite its previous contentions, Gulf Power has no evidence sufficient to meet the requirements of *Alabama Power*, to satisfy the constitutional standard of "loss to the owner," to substantiate its claims in its Description of Evidence, or to demonstrate the value of any claimed loss at the time of the alleged taking.[3]

ARGUMENT

I. Gulf Power's Discovery Responses Show That It Cannot Meet The Requirements Set Forth In *Alabama Power* To Support A Constitutional Claim For Utility Pole Rent In Excess Of Its Marginal Costs

A. Gulf Power Is Unable To Identify Individual Poles At "Full Capacity"

The Eleventh Circuit stated in *Alabama Power* that "before a power company can seek compensation above marginal cost, it must show with regard to *each pole* that (1) the pole is at full capacity." 311 F.3d at 1370 (emphasis added). By "full capacity," the court meant that there is no

[3] On July 11, 2005, Complainants filed a Motion to Compel with respect to Gulf Power's responses to Complainants' Interrogatories and Complainants' Requests for Production of Documents. As set forth in Gulf Power's responses, there appear to be no facts, material or otherwise, that support the "Description of Evidence."

remaining "space that could be occupied by another firm (or put to use by the power company itself)." *Id.* Gulf Power's discovery responses demonstrate that it cannot meet this requirement.

First, Gulf Power's responses show that it is unable to make the individualized, pole-by-pole showing of "full capacity" required by *Alabama Power*. In their Interrogatory No. 3, Complainants asked Gulf Power:

> For the pole attachments identified in response to Interrogatory No. 1, identify, for each cable operator Complainant for the period from 2000 through the present: the total number of Gulf Power poles that You contend were, are, or have been at "full capacity" within the meaning of the Alabama Power v. FCC standard;" *the location and individual pole number of the specific poles You contend were, are, or have been at "full capacity;"* the specific period of time You contend the poles You identified were, are, or have been at "full capacity;" and the specific reason or reasons why You contend such poles were, are, or have been at "full capacity."

Exhibit D, 4 (emphasis added). Gulf Power's response stated:

> Gulf Power contends that all poles identified in response to interrogatory number 1, at all times, since 2000, were either "crowded" or at "full capacity." For the purposes of this proceeding, Gulf Power has contracted with Osmose to perform an audit of its poles to ascertain crowding band [sic] on vertical clearances. Following completion of the audit, Gulf Power will supplement this response to identify those poles meeting the definition of "crowded" as used in the Osmose Statement of Work.

Exhibit D, 4.

Instead of identifying "each pole" that Gulf Power contends is at "full capacity," as required by *Alabama Power*, *see* 311 F.3d at 1370, Gulf Power stubbornly and cavalierly asserts that "all poles" containing Complainants' attachments "at all times, since 2000 were either 'crowded' or at 'full capacity.'" Gulf Power's blanket contention is unalterably inconsistent with the individualized pole capacity showing required under *Alabama Power* and implemented by the Presiding Judge. *See* Status Order of April 15, 2005 (FCC 05M-23) and Order of December 15, 2004 (FCC 04M-41)

("Gulf Power --- bears the burden of proceeding with the introduction of evidence and the burden of proving it is entitled to compensation above marginal cost *with respect to specific poles*")(emphasis in original).[4]

Second, Gulf Power cannot base a constitutional claim for compensation greater than its marginal costs (let alone the higher amount that it actually receives) upon mere allegations that its utility poles are "crowded." The HDO established the issue in this case as "Whether Gulf Power is entitled to receive compensation above marginal costs for any attachments to its poles belonging to the Cable Operators, and, if so, the amount of any such compensation." HDO, ¶ 11. This statement of the issue was in turn based upon the requirements laid down in *Alabama Power* that:

> [B]efore a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at *full capacity* and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.

Id. at 1370-71 (emphasis added). As the Presiding Judge has held, Gulf Power must

> [b]e more consistent in terminology in describing pole utilization as "full capacity" or "fully utilized." The term "pole crowding" is ambiguous. The Eleventh Circuit holds there to be no right to consider more than marginal costs unless a pole is a "full capacity," which standard of proof was adopted by the Commission.

Status Order (April 15, 2005), 5.

Despite the requirement of proving that specific poles are at "full capacity," Gulf Power's answer to Complainants' Interrogatory No. 3 makes clear that it continues to rely upon the

[4] Notably, in addition to being unable to meet Alabama Power's requirement of identifying individual utility poles at "full capacity," Gulf Power also refuses to accept *Alabama Power*'s statement of what "full capacity" means. As the Eleventh Circuit made clear, "full capacity" connotes a situation on a particular pole where there is no "space that could be occupied by another firm (or put to use by the power company itself)." 311 F.3d at 1370. Yet, when Complainants, in their Interrogatory No. 2 asked Gulf Power for its understanding of the term "full capacity," Gulf Power purported to define it in a much more limited fashion as "a pole that cannot host further communications attachments" (as opposed to lacking additional space for attachments by any entity, including the pole owner). Exhibit D, 2.

ambiguous term "crowded" and that, even when its consultant, Osmose, has completed its pole survey, it will not be able to identify individual poles at "full capacity." In particular, while Gulf Power claims it intends to "supplement" its response to Interrogatory No. 3 "to identify those poles meeting the definition of "crowded" as used in the Osmose Statement of Work," there is no corresponding promise to identify specific poles that are at "full capacity." The "Statement of Work / Joint Use Audit" dated March 4, 2005 that Gulf Power signed with Osmose, Inc. includes a definition of a "crowded" pole but includes no definition, specifications, or discussion of when a pole is to be deemed to be at "full capacity." *See* Gulf Power's Motion for Extension of Time (March 23, 2005)(attached Statement of Work). It may be that Gulf Power hopes to equate a "crowded" pole with one at "full capacity," since it says, in the Osmose Statement of Work, that "the primary purpose of this audit [is] a determination of the number of "crowded" or "full-capacity" poles." *Id.*, Statement of Work, 4. However, as the Presiding Judge has stated in his April 15th Order, the standard of proof for the first prong of the *Alabama Power* test is "full capacity" – nothing less.

Indeed, Gulf Power's discovery response makes clear that the Osmose Survey will not withstand review. Gulf Power has already conceded that it had no evidence at the time it filed its Description of Evidence. As the Presiding Judge noted, "Gulf Power represent[ed] that it cannot identify specific poles it contends are '*crowded*' or at '*full capacity*'" without a survey. Status Order (April 15, 2005) 1. But now, Gulf Power's answer to Interrogatory No. 3 also makes clear that it cannot identify, even at the present time, any full poles. This should be enough to dismiss the case immediately, because the inability to identify specific poles contradicts the "Description of Evidence" that Gulf Power filed with the Bureau in 2004 and that formed the sole basis for commencing this proceeding. The Bureau's HDO allowed Gulf Power to submit the evidence that

had been described in its Description of Evidence, not create new evidence or otherwise avoid the consequence of having no evidence that meets the requirements for claiming additional compensation.[5]

In conclusion, Gulf Power's response to Complainants' Interrogatory No. 3, by failing to meet (or even to commit to meet in the future) the requirements of proof for individual utility poles and of showing, for each such pole, "full capacity" (as opposed to the undefined and much more ambiguous "crowding"), makes clear that Gulf Power cannot meet the first part of the *Alabama Power* standard. This proceeding should be dismissed on this ground alone.

B. Gulf Power's Discovery Responses Also Show That It Cannot Meet The Second Part Of The Alabama Power Test – A Showing That It Lost An Opportunity To Either Lease Pole Space To A Third-Party Willing To Pay More Than Complainants Or To Put Space Occupied By Complainants To An Actual "Higher Valued Use"

The second prong of the *Alabama Power* test requires a showing that the pole owner lost an actual opportunity to use the pole space occupied by Complainants' attachments for a "higher valued use." Gulf Power's answers to Complainants' discovery requests fail to demonstrate any actual instance that would meet this part of the *Alabama Power* standard.

In addition to setting out the predicate requirement of a showing of particular poles at "full capacity," the Eleventh Circuit in *Alabama Power* stated that a pole owner making a constitutional claim for compensation above marginal costs must also demonstrate:

> that (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations.

[5] At the hearing in March the Court deferred Complainants' suggestion that the matter should be dismissed and instead authorized a six-month survey. *See* Transcript of March 30, 2005 Prehearing Conference at 180-83 (exchange between Counsel for Complainants and the Court). As noted in Complainants' Response to Gulf Power Company's June 2005 Status Report on Pole Survey, filed July 6, 2005, there have been significant delays in completing the survey. Gulf Power's July Status Report (filed July 29, 2005) shows an even greater likelihood of non-completion because no new poles were surveyed in June *or* July. Gulf Power also notes that "the full survey may include less than Gulf Power's entire service territory" but then improbably states that the survey "will be completed within the time frame allowed." That depends on what "completed" means.

311 F.3d at 1370. Consistent with the constitutional requirement of measuring "just compensation" by the "loss to the owner," the Eleventh Circuit explained that pole owner would have to show that, either with respect to a third party's offer or its own use, it had actually "incur[red]" a "lost opportunity or [some] other burden." Id. at 1369.

However, Gulf Power's answers to Complainants' interrogatories establish that Gulf Power cannot meet these standards. In Interrogatory No. 4, Complainants asked:

> For the poles identified in response to Interrogatory No. 3 which You contend were, are, or have been at "full capacity," identify, for each year from 2000 through the present and for each cable operator Complainant, the number of such poles for which You contend that Gulf Power had or has "waiting in the wings" "another buyer of the space" occupied by Complainants' attachments or some other space on Gulf Power poles; identify all such "buyers;" identify the period of time when they were, are, or have been "waiting in the wings" and explain Gulf Power's understanding of the term "waiting in the wings;" identify what rate or compensation such other buyer was, is, or has been ready, willing, and able to pay to Gulf Power for access to the space occupied by Complainants' attachments or some other space on Gulf Power poles; identify whether such other buyer has obtained an attachment to Gulf Power poles and, if so, how such attachment was accomplished; and whether the pole you assert was at "full capacity" was or was not replaced or substituted and the reasons therefore.

Exhibit D, 4. Gulf Power's Response stated that:

> Gulf Power understands the phrase "waiting in the wings" (as used in APCO v. FCC) to be figurative, insofar as requiring identification of an actual buyer would completely reject the hypothetical "willing buyer" standard and thus be at odds with more than 100 years of United States Supreme Court jurisprudence. In each instance where Gulf Power has changed-out a pole for capacity reasons to accommodate a new attacher, a "buyer" had been "waiting in the wings" for space on a "crowded" or "full capacity" pole. Sometimes those buyers have been ready, willing and able to pay the Cable Rate; sometimes the Telecom Rate; and sometimes a market rate. The most prominent instance of such occurrence is in the context of

major build-outs. (See Gulf Power's January 8, 2004 Description of Evidence).

Exhibit D, 4-5.

In its response to Interrogatory No. 4, Gulf Power fails to identify a single specific instance in which it actually had another buyer for pole space "waiting in the wings" that could not be accommodated on poles that were at "full capacity.' Instead, it advances the legal argument that the Eleventh Circuit's use of the term "another buyer of the space is waiting in the wings" is "figurative" and "hypothetical." This is plainly wrong. There is nothing "figurative" or "hypothetical" about the Eleventh Circuit's test. The test specifically states that Gulf Power must "show" "with regard to each pole" that "another buyer of the space" was or is "waiting in the wings." 311 F.3d at 1370. In other words, Gulf Power must have incurred a "missed opportunity" "to sell space to another bidding firm" *before* it can proceed to determine what its purported loss is. *Id.*

While there has often been reference to hypothetical buyers when establishing value, here the Eleventh Circuit dispensed with hypotheticals and required that there be an actual existing buyer present – not some hypothetical unidentified buyer who may appear only "figuratively" – in order for a pole owner to assert a claim for additional compensation. Perhaps Gulf Power's syntactic error is the basis for its claim that all its poles are full because there are only hypothetical buyers, not real buyers. Indeed, Gulf Power only alleges, in broad brush, that third parties were "waiting in the wings" in connection with pole change-outs that it performed and fails to identify any parties that it was unable to supply attachment space to, fails to identify individual poles, and, most importantly, fails to explain how pole change-outs paid for by new attachers create any "lost opportunity" or "missed opportunity" for Gulf Power. Indeed, when Gulf Power refers in its answer to Interrogatory No. 4 to "major build outs," it refers to instances where it accommodated additional

attachers – not to any instances where it "missed out," because of Complainants' attachments, on the opportunity to charge a third party any particular rate, let alone a rate higher than that already paid by Complainants. The bottom line is that Gulf Power has failed to prove that it lost a single opportunity to lease space on utility poles containing Complainants' attachments to other parties willing to pay more than Complainants.

Similarly, Gulf Power has failed to present proof of a single, specific instance in which it actually incurred a "lost opportunity" to put space occupied by Complainants to a higher valued use of its own. In Interrogatory No. 5, Complainants asked:

> For the poles identified in response to Interrogatory No. 3 which You contend were, are, or have been at "full capacity" and for which You have not had "another buyer of the space" "waiting in the wings" as specified in response to Interrogatory No. 4, identify, for each year from 2000 through the present, and for each cable operator Complainant, all poles, by total number, and individual pole number and location, for which You contend Gulf Power was, is, or has been willing, during the period from 2000 through the present, to put the space occupied by Complainants to a "higher valued use with its own operations;" identify what that "higher valued use" was, is, or has been; identify how and why such use is of a "higher value" than the make-ready and annual per-pole compensation received by Gulf Power from Complainants; and quantify the difference between the make-ready and annual per-pole compensation paid by Complainants to Gulf Power and the "higher value" that You claim. Provide any applicable citation to economic or regulatory literature that supports your response.

Exhibit D, 5. Gulf Power's response stated:

> Gulf Power objects to the first half of the question on the grounds that it is vague, ambiguous, and impossible to understand. Subject to and without waiving this objection, Gulf Power believes that any space occupied by a cable company can be put to a "higher valued use." The space can be reserved for sale to players in the burgeoning Telecom market; the space can be reserved for non-regulated communications attachers; the space can be used for Gulf Power's own communications use (or that of its affiliates). From Gulf Power's perspective, merely forcing the cable companies to develop their own infrastructure, rather than freeload

> on Gulf Power's facilities, is itself a "higher valued use." This is especially true in light of the Enforcement Bureau's trend towards operational micro-management and evisceration of conventional commercial contract protections (See, e.g., CTAG).

Exhibit D, 5.

As the Presiding Judge noted in the April 15, 2005 Order, Interrogatories 4 and 5 are "fair questions to pose to Gulf Power, the party seeking a substantial increase in monetary rent." But once again, Gulf Power avoids the obvious answer that it has no such evidence. Gulf Power merely offers legal argument and hypotheticals instead of the "proof" of any actual "missed opportunity" to put pole space occupied by Complainants to a "higher valued use." Gulf Power asserts that it "believes that any space occupied by a cable company can be put to a 'higher valued use.'" This mere assertion about what "can" or could be done utterly fails to meet the *Alabama Power* test, which requires a specific showing, for "each pole," of an *actual* – not hypothetical – "lost opportunity." 311 F.3d at 1369-70.

Moreover, Gulf Power cannot claim that any reservation of space for itself is a higher valued use. Such reservations are narrowly limited by applicable judicial precedent. In *Southern Co. v. FCC*, 293 F.3d 1338, 1348-49 (2002), the Eleventh Circuit upheld both an FCC guideline limiting utilities' reservation of pole space to reservations done pursuant to a bona fide development plan to use the space in core utility service, and another guideline requiring utilities to permit attachers to use reserved space until the utility demonstrates an actual need for the space. Therefore, whether or not space "can" be reserved is irrelevant as a "hypothetical" future use would be insufficient. Under *Alabama Power* and *Southern Co.*, a pole owner must show "proof" that, because of Complainants' attachments, it lost an opportunity, on specific poles, to put that space to an actual, quantifiable, higher-valued use. 311 F.3d at 1370; 293 F.3d at 1348-49. Gulf Power's answer, by simply listing possible uses that it subjectively deems generally to

be of greater value, without substantiating whether a higher valued use actually existed for a particular pole at a particular time, and without identifying and quantifying such uses for "each pole," does not meet the *Alabama Power* requirements.

Gulf Power's utter failure to satisfy the second prong of *Alabama Power* is made further manifest by its attempt to recycle an argument that it has already lost: that "forcing the cable companies to develop their own infrastructure, rather than freeload on Gulf Power's facilities, is itself a 'higher valued use.'" This contention, by suggesting that Gulf Power should be compensated by the benefit to Complainant cable operators (according to Gulf Power's "perspective," Complainants benefit by not having to "develop their own" pole system) is another attempt to impose a "gain to the taker" standard of just compensation. But the Eleventh Circuit firmly rejected Gulf Power's legal theory in *Alabama Power*, explaining that

> The legal principle is that in takings law, just compensation is determined by the loss to the person whose property is taken. Put differently, 'the question is, What has the owner lost? not, What has the taker gained?

311 F.3d at 1369. Therefore, Gulf Power's legal posturing, and its self-serving criticism of what it calls "the Enforcement Bureau's trend towards operational micro-management and evisceration of conventional commercial contract protections" cannot substitute for actual proof of a lost opportunity to put space occupied by Complainants' attachments to a higher valued use.

II. Gulf Power's Discovery Responses Also Demonstrate That, In Addition To Not Being Able To Identify Specific Poles At "Full Capacity" And Not Being Able To Articulate Actual "Missed Opportunities" To Implement A "Higher Valued Use," It Cannot Show The Underlying Proof Of Loss That Is A Constitutional Requisite To Establish A Right To Compensation Greater Than Its Marginal Costs

Gulf Power's claim in this proceeding should be dismissed not only because it fails to meet the two-pronged test set forth in *Alabama Power* but also because its discovery responses show that it cannot satisfy the constitutional standard *underlying* a just compensation claim. As

discussed in the previous section, that standard is that just compensation is "determined by the loss to the person whose property is taken." *Id.* As the Eleventh Circuit explained, in the pole attachment context, absent proof of a specific, quantifiable loss, whether an actual, out of pocket cost, or a demonstrable, quantifiable lost opportunity, "so long as marginal cost is paid, the power company incurs no lost opportunity or any other burden." *Id.* Gulf Power's answers to Complainants' interrogatories show that it cannot produce evidence of either actual, un-reimbursed, out-of-pocket costs or specific, quantifiable lost opportunities, and therefore, as a matter of law, Gulf Power is not entitled to compensation above its marginal costs for any attachments to poles containing Complainants' attachments.

Gulf Power fails to provide any specific evidence of either an actual, out-of-pocket loss, or a specific, quantifiable lost opportunity to earn greater revenue than what Complainants already pay for the space on Gulf Power's poles. In Interrogatory No. 9, Complainants asked:

> Identify, quantify, and explain the basis of any actual loss (income or other revenue) that Gulf Power contends that it has experienced from 2000 to the present, which it alleges was caused by attachments of cable operator Complainants (and explain in your answer how the alleged actual losses are or will be proved, including any reliance upon Gulf Power's specifications, accounting records, engineering documents, or testimony).

Exhibit D, 6. Gulf Power's response stated that

> From 2000 to the present, Gulf Power's actual loss is measured by the difference between the rate paid by complainants and just compensation, plus interest at the maximum allowable legal rate. Gulf Power is not claiming as damages any actual loss other than the difference in rates, plus interest.

Exhibit D, 6-7. Gulf Power's answer is nothing more than legal argument.

Instead of identifying any actual losses, Gulf Power simply trots out another argument that it already lost before the Eleventh Circuit – that it deems its actual loss to be "measured by

the difference between the rate paid by the Complainants and just compensation, plus interest . . . ." In *Alabama Power*, the court noted that "it would not make sense" for Gulf Power to say that "even though we are not out any more money than we were before the taking, we are missing out on the opportunity to sell [attachment space] at what we deem the 'full market price' of this pole space." 311 F.3d at 1369. Gulf Power's answer to Interrogatory No. 9 is therefore inconsistent, as a matter of law, with the precedent established in *Alabama Power*. Gulf Power cannot assume that it is entitled to a much higher "just compensation" rate and then subjectively define its "loss" as the difference between what it already receives and what it, as a monopoly pole owner, would like to demand, without providing any proof of any actual "lost opportunity," let alone losses tied to specific poles.

Under established legal principles, a property owner such as Gulf Power, with monopoly control over access to utility poles, cannot claim monopoly rent or lost monopoly profits as just compensation. *See Lord Manufacturing Co. v. United States*, 84 F.Supp. 748 (1949)(not permissible "to permit a market value based on what almost amounted to a monopoly, plus a shortage of material elements, to constitute the measure of just compensation"). Instead, Gulf Power must prove a real and actual loss in order to be entitled to just compensation. *See United States v. Felin*, 334 U.S. 624 (1948)(plaintiff seeking just compensation has burden "of proving actual damage"; evidence merely of bookkeeping losses is insufficient; further, need to show "by reasonable allocations the portion of the loss properly attributable to the goods seized by the Government"); *United States v. Commodities Trading*, 339 U.S. 121 (1950)(holding that governmentally-set ceiling price was the maximum measure of just compensation "unless [the plaintiff] has sustained the burden of proving special conditions and hardships peculiarly applicable to it"); *see also Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003)(no

recovery when there is no "net loss"); *United States v. 38,994 Net Usable Square Feet of Space*, 1989 U.S. Dist. LEXIS 14152 (N.D. Ill. 1989)(property owner to be compensated "to the extent of his loss" and therefore evidence of actual costs incurred is relevant); *Thompson v. Tualatin Hills Park and Recreation District*, 496 F.Supp. 530 (D. Oregon)(the just compensation requirement means "that owners have a right to recover for real and actual losses resulting from governmental action . . ."). Accordingly, because Gulf Power is not entitled to monopoly rents under the guise of "just compensation," its admission, in its answer to Interrogatory No. 9, that it "is not claiming as damages any actual loss other than the difference in rates [between what it receives and what it demands]" makes it manifest that Gulf Power has no case.

Gulf Power's failure to show that it has experienced any actual losses due to Complainants' attachments is also reflected in its answer to Interrogatories 29 and 30. In Interrogatory No. 29, Complainants asked:

> Gulf Power represents that it will seek to present evidence of instances in which it has changed-out poles "due to lack of capacity." Describe and explain the circumstances in which a Gulf Power pole, according to You, had and/or has a "lack of capacity" and state where (by pole number and location) and when, if at all, any such determination of "lack of capacity" was made with respect to Gulf Power poles containing any of Complainants' attachments.

Exhibit D, 17. Gulf Power's response stated:

> A pole has a "lack of capacity" when another attachment cannot be made. (See response to interrogatory number 2 above). The determination of which poles lack capacity is made by field employees while riding the line to determine the feasibility of an attachment request. Such decisions are made almost everyday in the field and *there is no way of identifying each instance where this has occurred.* Complainants had attachments on poles changed-out in the build-outs referenced in Gulf Power's January 8, 2004 Description of Evidence.

Exhibit D, 17 (emphasis added). Gulf Power's answer indicates that it has no evidence of a lost opportunity (due to insufficient pole capacity) in connection with a pole change-out. It says decisions about pole change-outs "are made almost everyday in the field and there is *no way of identifying* each instance where this has occurred" (emphasis added). Thus, although Gulf Power alludes to Complainants' allegedly being attached to poles that have, at some time been changed out, its answer indicates that it has no record that Complainants' attachments have necessitated pole change outs or that Gulf Power has suffered any loss as a result of any change out.

Similarly, in Interrogatory No. 30, Complainants asked:

> Identify and explain every instance in which Gulf Power has changed-out a pole containing one or more of Complainants' attachments at Gulf Power's own expense (*i.e.*, un-reimbursed) as a result of a need to accommodate an electric transformer or other Gulf Power equipment or facility.

Exhibit D, 17. Gulf Power's response stated:

> It is not possible to identify each such instance, but Gulf Power changes-out poles at its own expense almost everyday in the field. If Gulf Power sees a pole that needs to be changed-out to serve a customer, Gulf Power changes-out the pole and serves its customer as fast as possible.

Exhibit D, 17. What is striking about this answer is that, while Gulf Power broadly asserts that it changes out poles "at its own expense," it fails to identify a single instance in which it has had un-reimbursed expenses due to its own need to change-out a pole containing Complainants' attachments for a bigger pole. Indeed, it claims "*it is not possible*" to do so. If it is not possible to identify any particular "full" pole that was changed out for a Complainant without reimbursement, then it is not possible to obtain additional compensation. Like the response to Interrogatory No. 9, Gulf Power's responses to Interrogatory Nos. 29 and 30 make it manifest

that Gulf Power cannot meet the constitutional requirement of showing an actual "lost opportunity" that might permit it to seek compensation above its marginal costs.[6]

III. Gulf Power's Claim Should Also Be Dismissed Because Its Discovery Responses Reveal That The "Evidence" That It Claimed To Have In Its "Description Of Evidence" Is Either Non-Existent Or Irrelevant To Its Constitutional Claim For A Substantially Higher Annual Pole Rent

In asking for this adjudicatory proceeding, Gulf Power relied upon "evidence" it claimed to possess regarding expenses relating to pole change outs. In particular, in its January 8, 2004 "Description of Evidence Gulf Power Seeks To Present In Satisfaction Of The Eleventh Circuit's Test," Gulf Power claimed that it had evidence of "pole change-outs due to full capacity" and evidence of "the number of occasions . . . in which it was required to change-out a pole [at "its own expense"], for its own core business purposes, due to capacity, where it would not have needed to do so in the absence of CATV or Telecom attachments." *See* Description of Evidence, 3-6 and n.13. But, when Complainants' Interrogatories asked several questions concerning pole change outs and whether Gulf Power could identify any un-reimbursed expenses, Gulf Power refused to answer, alleging that such issues are "not relevant to the hearing issues." These answers make plain that, whether Gulf Power never had such evidence, or had it and now thinks it is irrelevant, Gulf Power did not have the right to seek commencement of these hearing proceedings, and they should be immediately dismissed.

In Interrogatories 20 through 26, Complainants asked a series of questions designed, as the Presiding Judge fairly stated, to "flush out the proof" Gulf Power proferred in its Description of Evidence concerning pole change outs. In particular, Complainants asked:

---

[6] Gulf Power also wrongly seeks to equate "marginal costs" of pole attachments with the annual cable rents it receives under FCC regulations. *See* Gulf Power's responses to Interrogatory No. 7 ("Gulf Power contends that its marginal costs for each CATV attachment are equal to what the cable formula (plus a charge for grounds and arrestors) yields"). In fact, the Eleventh Circuit explained in Alabama Power that utilities, under the FCC Cable Rate, receive "much more than marginal cost." 311 F.3d at 1369. That finding is not subject to challenge here.

Interrogatory No. 20:

Identify and describe, for each cable operator Complainant, the number of Gulf Power poles that have been changed out from 1998 to the present in order to accommodate attachments of Complainants, the location of any such change-outs, the reasons for each change-out, and identify any and each instance in which Gulf Power was not reimbursed by Complainants for the costs of such change-outs.

Interrogatory No. 21:

Identify and describe the number of Gulf Power poles that have been changed-out on account of a communications attacher's request (other than Complainants) and the circumstances surrounding such replacement or substitution (*i.e.*, specify the reason for the change-out and the party whose action or request necessitated it).

Interrogatory No. 22:

Identify and describe the number of Gulf Power poles that have been changed-out on account of a non-communications attacher's request and the circumstances surrounding such change-out (*i.e.*, specify the reason for the change-out and the party whose action or request necessitated it).

Interrogatory No. 23:

Identify and describe the number of Gulf Power poles that have been changed-out on account of Gulf Power's core electricity service requirements and the circumstances surrounding such change-out (*i.e.*, specify the reason for the change-out and the party who paid for the costs associated with the change-out).

Interrogatory No. 24:

Identify and describe the occasions on which Gulf Power has refused to change-out a pole. Your response should include, but not be limited to, a description of the circumstances surrounding the refusal, the identification of the entity requesting the pole replacement, and an explanation of the reasons for Gulf Power's refusal and any alternate arrangement employed.

Interrogatory No. 25:

Describe and explain the steps and procedures involved in changing-out a pole, from a prospective attacher's request (or Gulf Power's own core electricity need) to completion (i.e., including processing, procurement, placement and transfer or existing facilities and equipment, including estimated time periods).

Interrogatory No. 26:

> Identify all persons involved in developing Gulf Power's pole make-ready and change-out procedures, their titles and responsibilities, and a description of their roles in formulating the procedures, and identify the specific persons, whether or not employed by Gulf Power, that You rely upon to determine whether make-ready or a change-out is needed, or whether a Gulf Power pole is at "full capacity," "crowded," or has a "lack of capacity."

Exhibit D, 13-14. In response to each of these seven Interrogatories, Gulf Power asserted that they sought information "not relevant to the hearing issues." Exhibit D, 13-14. In other words, Gulf Power now refuses to answer discovery requests about pole change outs.

Gulf Power's refusal to answer these interrogatories is nothing less than outrageous, given that it was granted the right to pursue these evidentiary proceedings in significant part upon its claims relating to pole change outs. It even went so far as to claim in its Description of Evidence that it "intends to present evidence of the number of occasions in the past few years in which it was required to change-out a pole, for its own core business purposes, due to capacity, where it would not have needed to do so in the absence of CATV or Telecom attachments." *See* Description of Evidence, 6 n.13.

Gulf Power also claimed that it had evidence that on a number of occasions, it had been "forced to change out the pole (to accommodate a transformer) at its own expense" because of Complainants attachments and that it could "prove this point." *See* Description of Evidence, 6. Complainants' Interrogatories reasonably sought to explore the question of whether Gulf Power incurred an un-reimbursed expense in changing out an entire pole *and* whether such an expense was caused by Complainants' attachments, because the federal statutes governing pole attachments bar a pole owner from collecting the costs of rearranging or replacing existing parties' attachments when they modify a pole to accommodate new attachments either of their

own or of third parties. 47 U.S.C. § 224(i). Yet Gulf Power now calls the subject "irrelevant" and refuses to answer.

Section 224(i) is highly relevant here for evaluating Gulf Power's claims. Although the Eleventh Circuit found there could be an instance where a pole owner may be entitled to more than marginal costs, that additional recovery may only be had from a new attacher. Federal law and implementing rules provide that the costs associated with a utility accommodating a *new* attacher may not be passed on to *existing* attachers unless the existing attacher makes its own beneficial modification at the same time. Section 224(i) provides:

> (i) An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of- way).

47 U.S.C. § 224(i). The FCC's rules also make this clear that unless the existing party "benefits" from the accommodation a new attacher, additional costs may not be passed through to the existing attachers:

> A party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party.

47 C.F.R. § 1.1416(b). The FCC explained its rule as follows:

> With respect to the allocation of modification costs, we conclude that, to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification. If a user's modification affects the attachments of others who do not initiate or request the modification, such as the